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Issue Date: 31 March 2006

Case No. 2005 LHC 01487

OWCP No. 06-193344

In the Matter of

JOHNNIE DAVIS,
Claimant
v.

ELLER & COMPANY,
Employer
and

SIGNAL MUTUAL INDEMNITY ASSN.,
Carrier

Appearances:
Stephen P. Morschetta, Esq., for Claimant
Laurence F. Valle, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Johnnie Davis, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he injured while his left wrist after falling at work, while employed by Employer; and that as a result he presently requires a surgical procedure.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on November 22, 2005, in Miami, Florida. (TR at 1).[1] Claimant submitted ten exhibits, identified as CX 1- CX 10, which were admitted without objection. (TR. at 16). Employer submitted five exhibits, EX 1 through EX 5, which were admitted without objection. (TR. at 18, 19). The record was held open for thirty

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

days for the submission of additional evidence. (TR. at 68). Employer submitted an additional exhibit, EX 6, post-hearing. Additionally, the record was held open until February 1, 2006 for the submission of post-hearing briefs. (TR. at 68). After the parties requested additional time, Employer submitted its brief on March 2, 2006, and Claimant submitted his brief on March 6, 2006.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant is temporarily and totally disabled because of work related injuries?

2. Whether Employer should pay Claimant's medical expenses pursuant to Section 7 of the Act, for a surgical procedure recommended by Dr. Jay Dennis?

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. The Court has jurisdiction over the parties hereto and over the subject matter of this claim.

2. The Claimant sustained a compensable accident arising out of and in the course of his employment with ELLER & CO. on March 25, 2004.

3. Claimant's claim for compensation was timely noticed and timely filed.

4. As a result of that compensable accident, the Claimant has alleged that he injured his left wrist/hand and his back. Employer/Carrier limits this Stipulation to Notice of Injury to the Claimant's low back and left wrist.

5. The Employer/Carrier accepted an average weekly wage of $325.44, with a resulting compensation rate of $257.71, and has timely paid the Claimant compensation benefits from the date of the accident through March 9, 2005.

6. Jay Dennis, M.D., was Claimant's first choice of physician.

7. There has been no Informal Conference in this case prior to the Final Hearing.[2]

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant testified that he was injured on March 25, 2004, while working as a "pallet jack operator." (TR. at 25). Claimant had additionally operated a forklift and a mule in his capacity as a Longshoreman. (TR. at 25). On the day of his injury, Claimant was working at a location called Port Everglades, and described his employment as "heavy duty work":

> Because you have to pick up heavy stuff like heavy boxes and luggage and whatever they need you to pick up and you have to place stuff on pallets. Sometimes, you have to place it on pallets and tell them to put it on the ship and all this kind of stuff off the containers.

(TR. at 26). Claimant also noted that operating the forklift was difficult work. (TR. at 26).

Claimant had previously injured his back and right hand, but testified that on the date of his accident in 2004, he was feeling "great [. . .] my back and everything was beautiful." (TR. at 27). Claimant testified that, until the date of his injury, he was able to perform his job without pain. (TR. at 27).

Claimant began working fulltime with the Longshore Union in October of 2003. (TR. at 45). Prior to being hired full-time, he worked "sporadically" as a Longshoreman. (TR. at 45). Claimant also described the other type of work he had engaged in during his life:

> I've done maintenance work. I've done center line work, painting strips up and down the road all over the state highways in Florida. I've done cooking. I've been working behind a garbage truck. I've been a – where I would go around and make sure that all the companies around would take care of their tires and what you call about tires and stuff like that. They weren't just throwing tires in the streets or stuff. I was also a longshoreman. I've been doing longshoreman work since '78, since I got out of high school. Now, I'm in a new – I'm a funeral director now. I went to school and I got my mortician's license. I haven't gotten my mortician's license yet because I haven't gotten my internship, but I have my degree, my Associate in Science degree. I've tried to better myself that way.

(TR. at 48). Claimant also received a certification as a cook. (TR. at 48). Claimant noted on cross that since the date of his accident, he has not attempted to work in any one of these occupations. (TR. at 48).

[2] JX 1.

Claimant testified that on March 25, 2004, he reported to the Longshoreman's Union Hall at around 5:00 or 6:00 in the morning, and was assigned to work for Employer. (TR. at 28). Claimant noted that on the day in question, he was assigned to the "Royal Princess" vessel. (TR. at 29). Claimant explained that at the time of his accident, he was operating a pallet jack inside the boat. (TR. at 29). Claimant explained:

> I was placing a pallet in the place where the person that wanted me to place it and as I was placing it, my whole body went up in the air and I hit the ground and I tried to break my fall with my left hand. That's why I broke my hand and I hurt my shoulder using my whole arm here and I also hurt my back. When I finally figured out what was going on, I must have been knocked out a few minutes or so. When I woke up, I seen water on the floor there. I must have slipped on the water and then slipped on the steel floor. It was a steel floor. There wasn't a carpet or anything. It was made out of steel.

(TR. at 30). Claimant recalled that he felt pain in his left wrist area and that "it was swollen real big." (TR. at 30).

Claimant testified that he was unable to work following his accident "[b]ecause my hand was hurting me and I couldn't use my hand then. My hand was in so much pain." (TR. at 31). Claimant testified that immediately following his accident, he was required to fill out some paperwork, and was instructed to seek medical attention:

> I had to drive myself there because no one ever came to take me there so I had to drive my own self to the hospital with one hand. When I got to the hospital, then I got the med work. They took a drug test to see if I was on alcohol or drugs and they found no alcohol and no drugs in my system because I don't drink alcohol nor do the other stuff.

(TR. at 31). Claimant testified that he was instructed by his doctor to take a few days off of work. (TR. at 32).

Claimant testified that his insurance carrier referred him to Dr. Stringham. (TR. at 33). Claimant was placed in a cast and underwent physical therapy. (TR. at 33). Claimant testified that the physical therapy "didn't help me that much." (TR. at 33). Dr. Stringham also prescribed Claimant medication for pain. (TR. at 35).

Claimant testified that he next saw Dr. Cummings upon the referral of Dr. Stringham. (TR. at 34). Claimant described his dissatisfaction with the appointment with Dr. Cummings:

> When I went to see Dr. Cummings, Dr. Cummings didn't even look at my hand. He just told me there was nothing wrong with my hand. He didn't give me no explanation or anything. He just says there wasn't anything wrong with my hand. He didn't even look at it. My hand was swollen all up. My wrist was swollen. My whole arm was swollen at that time and he

> didn't even take the time to even look at it. He didn't even take x-rays or whatever.

(TR. at 34). During the hearing, Claimant was informed that Dr. Cummings' notes indicated that Claimant became "uncooperative" at some point during the examination. Claimant agreed that he became uncooperative, explaining:

> [M]y hand was hurting me at that time. He was telling me that my hand was not hurting and there was nothing wrong with my hand. I have my own feelings. If you had my feelings, you'd know my hand was hurting.

(TR. at 35).

Claimant was next examined by Dr. Dennis in November of 2004. (TR. at 35). Claimant described the visit:

> [Dr. Dennis] took time with my hand and checked my hand thoroughly. He took a test – there was a test that he took that took the pressure – how much pressure I could take with my hand. He did all of that and found out that I couldn't really use my hand. He also took x-rays and he sat down and he told me what was really the matter with my hand.

(TR. at 36.) Claimant testified that he felt that this examination was "more complete." (TR. at 36).

Claimant testified that he also was examined by Dr. Eastlick. (TR. at 36). Claimant noted that this appointment was very short, lasting only "five to ten minutes, at the most." (TR. at 36). Claimant described this examination:

> [Dr. Eastlick] grabbed my hand – he just took my hand and he shook it and I told him, 'My hand is hurting. Why are you shaking my hand like that?' and he said, 'Well, there's nothing wrong with your hand.'

(TR. at 37). Claimant noted that he informed Dr. Eastlick of the pain and swelling he had in his hand. (TR. at 37). Claimant opined that Dr. Eastlick "was more concerned about he knows the insurance carrier more than he was going to help me with my hand." (TR. at 37).

Claimant described his current complaints with his hand:

> It hurts. It's still swollen. I can hardly – my fingers are very stiff at times. I can hardly move my fingers. It's just hard sleeping on it. When I go to sleep at night, I can hardly sleep. I'm hurting and cussing and mostly in pain.
>
> [. . .]

> Throbbing pain and it's real sharp all the time at the bottom of my wrist here on both sides of my wrist.

(TR. at 38). Claimant noted that his hand has remained swollen since the date of the accident. (TR. at 40).

Claimant testified that he also continues to suffer from back problems:

> I have some upper back problems. Sometimes, if I lay on my right all night, if I lay on my back on the other side, I try to stop from my own – my wrist and then when I wake up, it's total pain and I just couldn't turn over to lay on my side or my back and when I lay on my back, my back hurts me so I lay on my back every night.

(TR. at 40). Claimant also noted that he suffers from intermittent lower back pain. (TR. at 40).

Claimant testified that he continues to do the exercises he learned in physical therapy, but that "they aggravate the problem." (TR. at 41). Claimant detailed his current limitations caused by his hand injury:

> Well, if I pick up like a glass plate or glass cup, sometimes it falls out of my hand because I can't really hold it with my fingers. I can't even hold it in my hand. I just really can't use my left hand like I normally could before the accident.

(TR. at 41). Claimant elaborated that he did not have these problems prior to his accident. (TR at 42). Claimant testified that a variety of activities, including running, aggravates the pain in his hand. (TR. at 42).

Claimant testified he had enjoyed working for Employer, and would like to return. (TR. at 44). Claimant explained that he hasn't worked since his accident because of the pain in his hand and back. (TR. at 44). Claimant opined that he would not be able to operate a forklift with his injured wrist:

> I have to use both hands to drive a forklift and I can't use both hands. I've had to pick up luggage, I had to use both hands to pick up the luggage because it would be 300 pounds with 100 pound luggage and I can't do it with both hands.

(TR. at 44).

Claimant testified that he had never previously suffered an employment related injury to his left wrist or hand. In 1991, Claimant injured his back while working for the Florida Department of Transportation resulting in hospitalization for approximately 30 days. (TR at 54). In 1995, during the course of his employment with Oakland City Park, Claimant sustained an injury to his back and his right hand as a result of a slip-and-fall incident which resulted in a

workers' compensation claim. (TR. at 23, 24, 27). His right hand injury required surgical intervention. (TR at 28).

In addition to these work injuries, Claimant suffered a foot injury and underwent gallbladder surgery prior to 2004. (TR. at 27). He was diagnosed with diabetes and placed under a physician's care in 2000. (TR. at 27). Upon the advice of his doctor, Claimant resolved to lose weight and began exercising regularly. (TR. at 42-3). Otherwise, Claimant had a "clean bill of health" prior to the subject accident as all injuries had been resolved as of March 25, 2004. (TR. at 27-8). Claimant testified that he never sustained any injury to his left hand/wrist before the subject accident, and that he had never received any medical treatment of his left wrist/hand. (TR. at 28).

Medical Records of Dr. Douglas Stringham

Claimant sought treatment from Dr. Stringham on April 2, 2004. (CX 4). Upon examining Claimant and reviewing his past medical history, Dr. Stringham opined that Claimant was suffering from a lumbar strain/sprain and occult fracture left wrist. (CX 4-2). Dr. Stringham made the following recommendations:

> MRI scan of the left wrist is recommended to verify the presence of an occult fracture. A Thermophore is recommended. Physical therapy is prescribed. Celebrex is prescribed. [. . .] I will see the patient back after an MRI scan of the left wrist is performed for reevaluation or sooner if necessary. Cast precautions are given as it is recommended that the patient wear a short arm cast rather than a cock-up wrist splint.

(CX 4-2, 3). Dr. Stringham limited Claimant to "sedentary duty only, left arm work restrictions." (CX 4-3).

Dr. Stringham saw Claimant once again on April 22, 2004. (CX 4-4). Claimant continued to complain of pain in his hand and wrist, and said he got no relief from the pain medication. (CX 4-4). Dr. Stringham performed a physical evaluation, and noted that the MRI revealed "a fracture of the distal radius with intraarticular involvement, a tear of the TFCC likely pre-existing, and some degenerative change and edema about the scapholunate ligament." (CX 4-4). Following this visit, Dr. Stringham recorded the following impression:

1. Left distal radius fracture intraarticular, essentially nondisplaced with some degenerative change in the wrist and a TFCC tear.
2. Lumbar strain/sprain.

(CX 4-4) Dr. Stringham recommended physical therapy for Claimant's lower back, and requested to see Claimant in two weeks for cast removal. Claimant was also prescribed Darvocet, and was assigned a work status of "left arm work restriction in sedentary capacity." (CX 4-5).

Claimant reported some improvements during his May 6, 2004 examination, though he still had continued complaints of pain in his left wrist. (CX 4-6). Claimant's cast was removed, and the radiographs demonstrated "completion of osseous healing status post a distal radius fracture." (CX 4-6). Dr. Stringham's impressions following this visit were "healed distal radius fracture and resolved lumbar strain/sprain." (CX 4-6). Dr. Stringham made the following recommendations:

> Occupational therapy is prescribed as well as a cock-up wrist splint. Percocet is prescribed with renewal of medication precautions. I will see the patient back in two weeks with repeat radiographs of the left wrist for reevaluation or sooner if necessary.

(CX 4-6). Claimant was also assigned "left arm work restrictions." (CX 4-6).

Claimant was again examined by Dr. Stringham on May 20, 2004, during which he continued to complain of pain and swelling in his left wrist. (CX 4-7). Dr. Stringham noted:

> MRI scan of the left wrist performed on 4/19/04 revealed the distal radius fracture as expected but also a tear of the TFCC. Volar edema in the scapholunate ligament and some degenerative change in the radial aspect of the carpus.

(CX 4-7). Dr. Stringham opined that Claimant suffered from "left wrist fracture with recalcitrant pain, continued stiffness, and TFCC tear." (CX 4-7). Claimant was again recommended to continue occupational therapy, and his prescription of Percocet. (CX 4-7). Claimant was also recommended to consult Dr. Phillip Cummings "as the presence of a TFCC tear may very require the need for surgical intervention." (CX 4-7, 8). Claimant was again continued on his left arm work restriction. (CX 4-8).

On June 4, 2004, Claimant "reported no improvement with continued complaints of pain and stiffness in the left wrist." (CX 4-9). Claimant informed that he has undergone therapy and has consulted Dr. Cummings. (CX 4-9). Dr. Stringham's physical examination of Claimant "demonstrate[d] no significant tenderness over the dorsum of the left wrist. There is significant tenderness over the dorsum of the left wrist. There is minimal restriction with range of motion. There is pain specific tenderness over the ulnar carpal joint." (CX 4-9) Dr. Stringham opined that Claimant suffered from "[l]eft wrist sprain with TFCC tear." (CX 4-9). Claimant was given a cortisone shot, continued on his prescriptions, and encouraged to continue with therapy. (CX 4-9). Claimant's work restriction as of this date was "left upper extremity restriction of five pounds." (CX 4-9).

Claimant returned for a follow-up visit on June 18, 2004. (CX 4-11). Dr. Stringham had reviewed Dr. Cummings' report, and noted the following:

> Dr. Cummings did not recommend that the patient would be able to return to work at the time of the visit. He did recommend continued splinting and aggressive occupational therapy as well as anti-inflammatory. Dr.

> Cummings also indicates that the patient may have problems for six months to a year following this type of injury. The patient does continue to complain of some discomfort, but he states the pain is more intermittent than it was previously. He has worn a cock-up wrist splint. He has received occupational therapy. He has taken Bextra. He does request refills. He would like to return to therapy. He has not been back to work.

(CX 4-11). After a physical examination, Dr. Stringham diagnosed "left wrist pain with TFCC tear." (CX 4-11). Dr. Stringham recommended "continuation of occupational therapy and anti-inflammatory. He will wear the cock-up wrist splint as needed." (CX 4-11). Claimant was also continued in his "left arm work restriction." (CX 4-11).

Medical Records of Dr. Zlatkin, Orthopedic Center of South Florida

Dr. Zlatkin performed the MRI on Claimant's left wrist on April 19, 2004. (CX 9). Dr. Zlatkin made the following findings:

> The examination is somewhat limited examination due to the pattern of placement of the patient in the magnet. There does, however, appear to be a fracture of the distal radius. It is transversely oriented. There is mild shortening. There is neutral facing of the articular surface. There appears as if there may be a linear component which extends towards the articular surface in the central aspect in addition to the transverse portion indicating some element of comminution. The fracture is identified by the presence of transverse low-signal intensity lines and some associate prominent bone marrow edema. Of note is a tear of the central to radial aspect of the triangular fibrocartilidge. There is some edema along the volar aspect of the scapholunate ligament which may reflect sprain and injury related to the more recent injury. There is some edema along the inferior medial aspect of the lunar but, perhaps, this may reflect that the TFC tear is more chronic in nature and there may be some element of ulnocarpal abutment. The lunotriquetral ligament is not well seen but appears to be grossly intact. There appears to be some radioscaphoid and triscaphe joint degenerative change which may be pre-existent in character. There is some dorsal and volar swelling and edema, and there is some mild fluid in the flexor extensor tendon sheaths which may reflect some posttraumatic tenosynovitis.

(CX 9).

Upon conclusion of his examination of Claimant, Dr. Zlatkin yielded the following impressions:

> 1. Fracture of the distal radius with mild shortening and neutral facing of the articular surface. It is transversely oriented with some

comminution and some extension in vertical fashion to the articular surface.

2. Tear of the triangular fibrocartilage in the central to radial aspect which could be a pre-existent degenerative tear as there is a mildly positive ulna and there is some edema in the inferior medial aspect of the lunar which could reflect pre-existent ulnocarpal abutment.

3. Volar edema in the scapholunate ligament could reflect sprain or injury.

4. Mild radioscaphoid and triscaphe joint degenerative change may reflect some pre-existent alteration.

(CX 9).

Medical Records of Dr. Phillip Cummings

Claimant sought treatment for his left wrist from Dr. Cummings on May 28, 2004, upon a referral from Dr. Stringham. (CX 10). Dr. Cummings performed a physical examination, and reviewed Claimant's history and radiographs. (CX 10). Upon conclusion of his examination, Dr. Cummings yielded the following impression:

> Right intraarticular distal radius fracture, clinically and radiographically healed or healing. The patient does not have any acute ligamentous injury that needs surgery. The incidental findings on the MRI of a TFCC tear and arthrosis, unrelated to the acute injury. He does have some edema in the volar aspect of the scapholunate ligament, but this is not the important portion of the ligament and this does not require surgery.

(CX 10).

Dr. Cummings created the following plan for Claimant's recovery:

> I recommend to the patient that he did not need to have any surgery, that he needed to aggressively work on range of motion and strengthening.
>
> The patient then became uncooperative with the examination and the interview ended.
>
> I recommend continued splinting. He needs aggressive occupational therapy to work on range of motion and strengthening.
>
> I do not feel that he can return to work at this time.

> I advised the patient that it is normal to have pain and swelling at this point, as he just recently came out of his cast. He may continue to have problems with pain and swelling intermittently for up to six months to a year post this type of injury.
>
> I recommend the use of some nonsteroidal anti-inflammatory drugs.

(CX 10).

Deposition of Dr. Cummings

Dr. Cummings is board certified in orthopedic surgery, and has a certificate of added qualifications for surgery of the hand. (EX 6-4). Dr. Cummings testified that he examined Claimant once on May 28, 2004, upon the referral of Dr. Stringham. (EX 6-5). Dr. Cummings explained:

> Dr. Stringham had treated him for a wrist fracture. He had taken him out of the cast, and the patient was complaining of pain, swelling, difficulty in using his hand, so Dr. Stringham sent him to me for a consultation.

(EX 6-5). Dr. Cummings reviewed Claimant's history, and performed a physical examination, which revealed:

> On examination of his left hand and wrist, he was wearing a splint when I had seen him, out of the splint, his skin was for the most part intact. He did have some swelling around his wrist. He had very limited range of motion of his wrist, and he had some digital stiffness.

(EX 6-6). Dr. Cummings also reviewed the MRI:

> He took some radiographs of his wrist on that day, and it showed that he had an interarticular distal radius fracture. That the fracture was minimally displaced, the articular surface was congruent and the fracture did appear to be healed.
>
> [. . .]
>
> The MRI also showed the fracture, and also suggested that the articular surface was congruent. The MRI also suggested that he may have had a degenerative TFCC tear, and that he had what was called a positive ulna variance.[3]

[3] Dr. Cummings explained:

> TFCC is short for triangular fibrocartilage complex, and that is a ligament that extends from the edge of the radius to the ulna, which are the two bones in the forearm.

(EX 6-6, 7).

Dr. Cummings was asked to opine whether Claimant's TFCC tear was related to his work accident or was degenerative in nature:

> My opinion was that it was probably not related to the accident. It was an incidental finding on the MRI, in that the patient had what's called a positive ulnar variance. When you have a positive ulnar variance, what tends to happen is you over time develop degeneration of the TFCC because of the bone's unequal length. When the ulna is long, whenever you bring your wrist into ulna deviation, which means bending the wrist in the coronal plane towards the ulna, you get knocking of the carpal hones against the ulna, which crushes the TFCC.
>
> [Claimant] is a longshoreman, so he does a lot of heavy lifting, and I am sure that tear that we are seeing radiographically was degenerative as a result of his positive ulna variance and his [. . .] activities [. . .] with the use of that hand.

(EX 6-9). Dr. Cummings noted that this is "a very common finding, not just with his age and work experience, but with patients that have a positive ulna variance." (EX 6-10). Dr. Cummings testified that he based his conclusion on "the whole clinical picture":

> I mean, he had – essentially, he had a non-displaced interarticular distal radius fracture. He has a positive ulna variance, and he had what appears to be a degenerative TFCC tear, which probably did not occur when he fell, but was just an incidental finding because an MRI was done. If the MRI wasn't done, he would not know about it.

(EX 6-10).

Dr. Cummings also testified about the additional findings he made from his examination of Claimant:

> Other things that were noted in the MRI. There was some edema in the scapholunate area, and there was also some degenerative arthritis in the radial carpal joint, which suggests some pre-existing arthritis.

(EX 6-10). Dr. Cummings also observed edema in the proximal ulnar aspect of the lunate, a finding Dr Cummings would not expect to see two months post-trauma. (EX 6-11) Dr. Cummings explained that "these changes in the lunate suggest that [Claimant] has been having

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> So at the wrist level, it's a ligament that goes across to the very ulnar side of the radius to the tip of the ulna.

(EX 6-8).

problems with the ulna carpal impaction because of the long ulna, and hence, the TFCC degenerative tear." (EX 6-11). Additionally:

> The whole clinical picture is consistent with ulna carpal impacting syndrome being pre-existing and then having an acute interarticuar distal radius fracture.

(EX 6-12).

Dr. Cummings detailed his recommendations in Claimant's case:

> I thought that him and his treating physicians were jumping the gun a little bit on, you know, him having normal motion. I mean I had only seen him like a couple of weeks after – his cast had only been off a week or two after this fracture, and they were concerned about stiffness and swelling.
>
> I told them, 'It's normal for you to be stiff and swollen. You just came out of your cast.'
>
> I told him that I felt that these things were – the changes that I saw in the TFCC were not because of an acute fracture and that did he not require surgery for it.

(EX 6-12). Dr. Cummings was asked on cross why Claimant's wrist has remained swollen more than twelve months after coming out of the cast:

> Well, it just depends. With an interarticular distal radius fracture, generally, most patients lose range of motion. So they may have some residual stiffness, just from the nature of the injury, particularly when they have pre-existing problems in their wrist, such as arthritis.
>
> Swelling, generally, the swelling after an injury to the hand or wrist, it starts to get at its very best about a year post-injury. So at about twelve months is where – really when the symptoms of swelling are plateauing, and it really just depends.
>
> [. . .]
>
> [T]here is swelling for different reasons, okay. With a distal radius fracture, you know, generally, when you have a distal radius fracture, particularly the type of fracture that he had, the size of the wrist may never get back to normal. He may always have some increased size of the wrist because of bone healing or scar tissue or edema within the tissues.
>
> Also, when you have – if you have a stiff wrist and you start working on moving it or you are slow in moving it, whenever you start working on

> moving the wrist and trying to improve the motion, you can cause swelling. So it just depends on the rehab process that this patient went through.

(EX 6-17, 18).

Dr. Cummings opined within a reasonable degree of medical certainty that Claimant:

> [D]id not need any surgery on his wrist when I saw him. What he needed was a little bit of patience and rehabilitative program to improve his range of motion and strength.

(EX 6-12, 13).

Dr. Cummings testified that, contrary to Claimant's assertions, the examination lasted longer than two minutes:

> With a new patient, generally, I spend somewhere between – you know, maybe seven to ten minutes just doing a history and examination and going over my findings.
>
> Our examination ended fairly quickly because he got upset with what I was telling him, and that's why our interview ended early.
>
> [. . .]
>
> [However,] before I go into the room, my medical assistant takes a history. I review the radiographs, I review the MRI before I go in, so I pretty much know what's going on before I examine him. So it's not like I have to review the X-ray and the MRI and those things when I am sitting in front of him. I just talk to him and examine him and left him know what's going on.

(EX 6-13, 14).

Medical Records of Dr. Jay Dennis

Claimant consulted Dr. Dennis on November 11, 2004. (CX 5). Dr. Dennis physically examined Claimant, and considered his medical history, x-ray and MRI report. (CX 5). Upon conclusion of this visit, Dr. Dennis noted that Claimant suffered from:

> Status post left distal radius fracture with associated injuries. According to the MRI report, read by Dr. Michael Zlatkin, there was a fracture of the distal radius, tear of the TFCC in the central to radial aspect, as well as volar scapholunatc ligaments. I would like to review these to see if in fact these are causally and acutely related to the index trauma. Based on that

> will dictate whether this is pre-existing or causally related and at that point we will make final surgical recommendations if appropriate to [Claimant]. He remains on light duty status with no lifting greater than 10 pounds to the left. We will see him back in the next few weeks after I have had a chance to review the MRI with our dedicated musculoskeletal radiologist.

(CX 5).

Claimant had a follow-up visit with Dr. Dennis on December 13, 2004. (CX 5). Dr. Dennis reviewed Claimant's MRI report, "which was consistent with a peripheral TFCC tear as well as a scapholunate ligament tear." (CX 5). Dr. Dennis noted:

> At this point, [Claimant] has been factory conserve care of his injury. He is now eight months post injury without any significant improvement. At this point, I have made formal recommendations for arthroscopic debridement, thermal shrinkage, and possible SL pinning and/or reconstruction. The risks and benefits of the procedure were discussed with him in detail and he understands that realistically he will not be able to go back to his former work as that of a longshoreman. I do not think he will be able to regain the strength from his operation to be able to perform longshoreman duties. The goal of the indicated surgery is to ameliorate his pain to an acceptable level. Surgical planning was initiated and we will need basic preoperative clearance. He remains on light duty status with no lifting greater than 10 lbs. on the left.

(CX 5).

Deposition of Dr. Dennis

Dr. Dennis is a board certified orthopedic hand surgeon. (CX 11-4). Dr. Dennis noted that his practice is limited exclusively to the care of wrists, hands and forearms. (CX 11-6). Dr. Dennis estimated that he performs approximately ten to twelve surgeries a week. (CX 11-6).

Dr. Dennis began treating Claimant on November 15, 2004, for injuries sustained as a result of a work accident. (CX 11-6). Dr. Dennis detailed the history he was provided by Claimant during the examination:

> He related to me that he sustained an injury while at work involving the left wrist on March 25, 2004. He stated to me that he slipped and fell on a steel floor of a boat and injured his left wrist. At that point, he brought me up to date as to which physicians he had seen prior, what examinations he had had prior, what imaging studies he had had and presented to me with a chief complaint of left wrist pain. He told me that since the time of his injury, he had not been working.

(CX 11-7). Dr. Dennis also performed a physical examination of Claimant on this date, which revealed that:

> [Claimant] has some residual stiffness. His range of motion was 50 to 60 percent of normal. His forearm rotation, which is basically a palm up/palm down position, was slightly limited.
>
> [. . .]
>
> His examination that day showed tenderness over the central wrist, which is the scapholunate region, mild tenderness over the outside of the wrist which is consistent with the TFC region.
>
> [. . .]
>
> He also had lost ability to do a grip strength. We did pinch and grip dynamometry, and it's reasonably reproducible. We actually measure strength, good side versus bad side and vice versa, and his strength was markedly diminished on the affected side.

(CX 11-8). Dr. Dennis also reviewed a number of medical records in forming his opinion.[4] (CX 11-23).

Dr. Dennis testified that he wanted to review Claimant's MRI before developing a plan of action. (CX 11-10). Dr. Dennis testified that Claimant's MRI, performed by Dr. Zlatkin, revealed a scapholunate ligament tear and TFCC ligament tear. (CX 11-12). Dr. Dennis noted that the radiologist that performed the MRI opined that the tear of the TFCC could be degenerative. Dr. Dennis felt that this opinion was "a bit of a stretch," and "a little bit of an editorial comment." (CX 11-12, 13).

Dr. Dennis again examined Claimant on December 13, 2004. (CX 11-11). Dr. Dennis noted that Claimant's physical examination revealed that his condition was essentially unchanged on this day. (CX 11-13).

Dr. Dennis opined that the complaints of pain Claimant suffered from on these two dates were consistent with Claimant's work injury suffered on March 25, 2004. (CX 11-15). Dr.

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[4] Dr. Dennis detailed the records made available for his review:

> There is a letter dated December 16, 2005 from Mr. Moschetta. Number one is the employee's claim for compensation; two is Med Work alcohol testing and urine samples; three is Med Work injury status report; four is Dr. Stringham; five would be myself, Jay Dennis, M.D., Orthopedic Care Center, my previous office; six would be Jay Dennis opinion; next would be Orthopedic Center of South Florida MRI left wrist opinion; and the last would be Philip B. Cummings, M.D., second opinion.

(CX 11-23).

Dennis further testified that the surgical procedure he recommended for Claimant was related to this same work accident. (CX 11-15). Dr. Dennis explained on cross:

> The chronology is that the gentleman has a wrist fracture. A wrist fracture – as they normally do assuming its reasonably aligned and casted or operated or whatever the appropriate intervention is – reasonably do well. Probably the biggest problem from wrist fractures themselves is some stiffness of the hand and the wrist. We weren't actively treating that on those two given days [of Claimant's visits with Dr. Dennis.] We were dealing with ligamentous injuries involving the wrist. There very typically can't be a sequelae of the previously bony wrist fracture, and that is what I felt was consistent with this previous injury.

(CX 11-28). Dr. Dennis testified that he was not in agreement with the opinion of Dr. Eastlick, that found Claimant's pain and need for treatment were unrelated to his work accident. (CX 11-16). Dr. Dennis further testified that Claimant's injuries of pain were compatible with his complaints, history and the medical and diagnostic review. (CX 11-22).

Dr. Dennis testified that there was no reason to disbelieve Claimant's complaints of pain, and he felt that they were objectively identifiable. (CX 11-22). Dr. Dennis explained:

> Based on my two points in time that I examined [Claimant], I didn't find any malingering, if you will. I found him to be cooperative. I found his examination and points of tenderness correlated with the MRI and, overall, were consistent with the previous documented injury.

(CX 11-22).

Medical Records of Dr. Eastlick

Dr. Eastlick examined Claimant on January 24, 2005. (EX 2). Dr. Eastlick performed a physical examination and reviewed Claimant's history before yielding the following analysis:

> [Claimant] has a history of a fracture to the left wrist with MRI findings of an old TFCC injury. I concur with Dr. Cummings regarding the age of the TFCC tear. I do not find evidence to suggest that he requires scapholunate ligament treatment, carpal tunnel release or other surgical treatments. He has reached maximum medical improvement. He has a zero-percent permanent impairment.

(EX 2).

Deposition of Dr. Eastlick

Dr. Eastlick is a Board Certified hand surgeon. (EX 1-3). Dr. Eastlick testified that he examined Claimant on January 24, 2005. (EX 1-6). Prior to this visit, Dr. Eastlick reviewed

Claimant's records created by Dr. Stringham and Dr. Cummings, as well as Claimant's MRI that was taken on April 19, 2004. (EX 1-6). Dr. Eastlick also reviewed the notes of Dr. Dennis. (EX 1-7).

Dr. Eastlick related the history Claimant had provided at the time of the examination:

> He said at that time he was 46 years old. He was right-handed and was a longshoreman. He said he injured his left wrist during the course of his work on March 25 of 2004.
>
> He said that he slipped inside of the ship and fell onto his left wrist. He was later evaluated at the workers' compensation clinic where x-rays were performed which demonstrated a fracture.
>
> He was then sent to Dr. Stringham. Dr. Stringham sent him for an MRI, which apparently indicated an injury to his distal radius and perforation of his TFCC.[5]
>
> After treating with Dr. Stringham – and I believe that his treatment was basically a cast – he went to see Dr. Cummings in that same office for evaluation of his TFC. It was Dr. Cummings' opinion that the findings were not related to the injury.
>
> [. . .]
>
> Thereafter referred to Dr. Dennis, who felt that the patient had both a SL injury[6] and a TFCC injury, as well as carpal tunnel syndrome.
>
> He said that the – the patient said that Dr. Dennis had recommended arthroscopic wrist surgery and carpal tunnel release[7]. And when he came

[5] Dr. Eastlick explained that "TFC" stands for triangular fibrocartilidge. "And that's located on the little finger side of the wrist." (EX 1-10).

[6] Dr. Eastlick explained that an SL injury "stands for scapholunate, which are two bones in the wrist. And that is actually a firm ligament that holds the two bones together, something like – something like the links on a chain." (EX 1-11).

[7] Dr. Eastlick explained:

> The carpal tunnel is located on the palmar side of the wrist. It's found in the mid portion of the wrist or the center.
>
> [. . .]
>
> In order to release the carpal tunnel, it would be necessary to cut the ligament that forms the roof in order to enlarge the space.

(EX 1-12).

> to the office, he was complaining of pain on the volar or palmar side of his wrist, on the dorsal side of his wrist. And that pain that he was describing in his wrist was limited to the radial side or the thumb side of his wrist.
>
> He said it was worse with activities and also while he slept. He said he had no pain on the ulnar side or the little finger side of his wrist.

(EX 1-9).

On the date of examination, Dr. Eastlick testified that Claimant was complaining of pain in the thumb side of his wrist, both top and bottom. (EX 1-12). Dr. Eastlick recalled that Claimant was not complaining of pain in the area near the pinkie, which is the triangular fibrocartilage area. (EX 1-13).

Dr. Eastlick described his findings from the physical examination of Claimant:

> Basically, his examination was essentially normal with the one finding of having some tenderness on the radial side of his wrist which he was not able to well localize.

(EX 1-13). Dr. Eastlick elaborated:

> Examination of his left upper extremity showed that he had no swelling. There was no visible deformity. Touching his wrist, he had tenderness on the radial side or the thumb side, both top and bottom. But he couldn't well localize it to any particular location.
>
> In other words, sometimes if you have patients that have specific injuries, they're able to localize it to a particular site. He wasn't able to have that degree of specificity with is pain. It seemed more generalized.
>
> Examining his wrist, he was noted to have normal rotation of his forearm and wrist. He was noted to have normal flexion and extension of his wrist.
>
> The Shuck test and the Watson maneuver, which are used to push on the bones to see if they're loose or the ligaments are loose, both of those were normal. There was no evidence that this ligament was loose.

(EX 1-14).

Dr. Eastlick described the various tests that Claimant took during his examination, including the Finklestein test, Fallon's and Tinel's sign, and found that there were no symptoms reported which he found to be consistent with carpal tunnel entrapment. (EX 1-15, 16). Dr. Eastlick found no evidence in his examination that was consistent with either carpal tunnel or the need for surgery for a carpal tunnel condition within a reasonable degree of medical certainty. (EX 1-16). Dr. Eastlick further noted that an x-ray showed that Claimant "had a healed fracture

of his distal radius and he had some generalized arthritis of a degenerative nature, not traumatic nature, but degenerative nature in his wrist." (EX 1-16).

Dr. Eastlick testified that Claimant had a fracture that involved the articulate surface of his radius. (EX 1-17). Dr. Eastlick opined that Claimant healed this fracture without surgery. (EX 1-17). Dr. Eastlick found that Claimant had no movement, which indicated a good result. Additionally, the x-rays taken by Dr. Cummings noted no significant deformity regarding the healing of the fracture. (EX 1-17). Dr. Eastlick agreed with Dr. Cummings' May 28, 2004 report which stated the articular surface appeared congruent and the fracture appeared to be healed radiographically. (EX 1-17). Dr. Eastlick found that the fracture lines were congruent and lined up in a normal fashion which is the best of what is hoped for as far as treatment. (EX 1-17).

Dr. Eastlick opined that the findings on Claimant's MRI were consistent with age-related perforation of the TFCC, and were not related to Claimant's traumatic injury. (EX 1-18). Dr. Eastlick explained that Claimant had no physical findings to associate with the area of the TFCC and an injury. (EX 1-19). Dr. Eastlick also noted:

> [I]f one were to look at all men in the population of [Claimant's] age without history of injury or with history of injury, one would find that a large majority of them would have age-related perforations in their triangular fibrocarilatge, which would be asymptomatic.

(EX 1-19). Dr. Eastlick further opined that Claimant reached Maximum Medical Improvement by January 24, 2005. (EX 1-19).

Dr. Eastlick testified that Claimant did not sustain any permanent physical impairment from an orthopedic view as a result of the March 25, 2004, accident. (EX 1-20). Accordingly, and in consideration of Dr. Dennis' medical records, Dr. Eastlick opined that Claimant did not require any surgery, or any additional medical or remedial medical care for any of the injuries which were related to this accident. (EX 1-20).

Dr. Eastlick acknowledged that Claimant did fall and fracture his wrist, but opined that Claimant "went on to have an excellent result by any measure." (EX 1-21). Additionally:

> There was no evidence at the time I examined him either radiographically or by physical examination of a scapholunate injury. There was no evidence of a triangular fibrocartilage injury. And there was no evidence of carpal tunnel syndrome.

(EX 1-21).

Dr. Eastlick testified that Claimant should be able to perform all the normal duties that one would do in the course of being a longshoreman and all things he had done prior to his injury. (EX 1-22). Dr. Eastlick imposed no limitations on Claimant's activities. (EX 1-23). During the course of his practice, Dr. Eastlick indicated that he frequently confronts problems

such as the one that Claimant's history has presented, and, when necessary, would perform surgery in those cases. In this particular case, however, Dr. Eastlick did not believe surgery was necessary. (EX 1-23).

Analysis

The parties stipulated that Claimant sustained a compensable accident arising out of and in the course of his employment with Employer on March 25, 2004. (JX 1). There is sufficient evidence in this record that Claimant had a work related accident, and that as a result, he injured his left wrist. Employer has offered no rebuttal evidence, and I thus accept the parties' stipulation and find that Claimant suffers from a compensable injury.

As a result of this accident, Employer paid Claimant temporary total disability benefits from March 25, 2004, the date of the accident, through March 9, 2005, at a rate of $257.71 per week. (TR. at 12). Employer had been voluntarily paying these benefits without the entrance of an award. Subsequently, Employer filed an LS-208, which stated the following reasons for termination of payments as of March 9, 2005:

> Dr. Stringham released [C]laimant to return to full duty work, no restrictions, for back injury. Dr. Eastlick returned [C]laimant to full duty work, no restrictions for left wrist fracture.

(LS 208).

In the present action, Claimant asserts that Employer is responsible for past and future medical benefits and surgery for the injuries has sustained as a result of the March 25, 2004 work accident, including the wrist surgery recommended by Dr. Dennis. Claimant also argues that he remains entitled to ongoing temporary total disability from the date his benefits were terminated on March 9, 2005, through the present and continuing.

Necessary and Reasonable Medical Expenses

Claimant argues that Employer is responsible for the surgery on his wrist that has been recommended by Dr. Dennis. Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2002). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). Under the Administrative Procedures Act, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence that medical treatment is reasonable and necessary. *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 2259, 512 U.S. 267, 281, 129 L. Ed. 2d 221 (1994).

Establishing a *Prima Facie* Case of Reasonableness and Necessity

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co*., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv*., 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co*., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), *aff'g* 12 BRBS 65 (1980).

To reiterate, a claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp*., 21 BRBS 294, 296 (1988). Dr. Dennis made a formal recommendation for Claimant to undergo an arthroscopic debridement, thermal shrinkage, and possible SL pinning and/or reconstruction. Dr. Dennis noted that the goal of the indicated surgery is to ameliorate Claimant's pain to an acceptable level. (CX 5). Dr. Dennis testified that this surgical procedure he recommended for Claimant was related to this same work accident dated March 25, 2004. (CX 11-15). Accordingly, Claimant presented a *prima facie* case that the recommended wrist surgery is both reasonable and necessary, and related to a compensable injury.

Rebuttal of Claimant's *Prima Facie* Case

To rebut a claimant's *prima facie* showing that a recommended medical treatment is either not reasonable or not necessary, the employer is required to produce substantial evidence to that effect. *Conoco, Inc.*, 194 F.3d 684, 690 (5th Cir. 2000) (stating that the hurdle is far lower than a "ruling out" standard); *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). Employer met its burden in this case.

Here, Employer has presented substantial evidence that Claimant's proposed medical treatment is neither reasonable nor necessary. Employer argues that there is no need for surgery stemming from Claimant's work accident, as demonstrated by the medical records and testimony of Dr. Cummings and Dr. Eastlick. (Employer's Brief at 3). Dr. Cummings opined within a reasonable degree of medical certainty that Claimant:

> [D]id not need any surgery on his wrist when I saw him. What he needed was a little bit of patience and rehabilitative program to improve his range of motion and strength.

(EX 6-12, 13). Further, Dr. Eastlick opined that Claimant did not require any surgery, or any additional medical or remedial medical care for any of the injuries which were related to his work related injury. (EX 1-20). In light of this evidence, I find that Employer has sufficiently rebutted Claimant's *prima facie* case.

Reasonable and Necessary Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut a claimant's *prima facie* case, the claimant must establish entitlement to the medical treatment based on the record as a whole. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If the evidence in the record is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281. The opinion of a treating physician is entitled to special consideration. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001); *Cf. Consolidated Coal Co. v. Hold*, 314 F.3d 184, 187-88 (4th Cir. 2002) (finding however that the special consideration extended to a treating physician cannot be accorded greater weight than other physicians base only on his status); *Consolidation Coal Co. v. Director, OWCP*, 54 F.3d 434, 438 (7th Cir. 1995) (disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001).

Claimant has elected treatment from Dr. Dennis since November 15, 2004. During their initial consultation, Dr. Dennis concluded that there were two components to what was a combination injury suffered by Claimant: 1) Claimant had sustained a wrist fracture, specifically of his distal radius and had already healed from that standpoint by November 15, 2004, even though Claimant had some residual stiffness and soreness; and 2) What remained were soft tissue injuries, specifically ligamentous tissues, which resulted from the fracture sustained in the work related accident. (CX 11-9, 10, 36). Upon reviewing Claimant's MRI, Dr. Dennis saw what he concluded was a tear of the TFCC and of the scapholunate ligament, findings that corroborated his working diagnosis from his physical examinations and observations of the points of tenderness in Claimant's wrist. (CX 11-12, 13).

On December 13, 2004, Dr. Dennis noted that Claimant was eight months post injury without any significant improvement. Dr. Dennis linked Claimant's pain to the TFCC tear, and further opined that Claimant's tear was caused by his work related accident in March of 2004. Thus, Dr. Dennis recommended surgery, with the goal of the indicated surgery is to ameliorate Claimant's pain to an acceptable level.

Employer argues that because the last time Dr. Dennis examined Claimant was on December 13, 2004, he would have no direct knowledge of whether Claimant continued to suffer from pain following this date. Notably, Dr. Eastlick subsequently examined Claimant on January 24, 2005. At that time, Claimant was not complaining of any pain on the small pinkie site of the wrist, which would reflect the area of triangular fibrocartilidge (TFCC). Therefore, Employer argues, there is no rebuttal to Dr. Eastlick's subsequent finding that Claimant was asymptomatic.

It is undisputed in this case that Claimant's April 19, 2004 MRI showed a comminuted fracture of the left distal radius, a "tear of the triangular fibrocartilidge in the central radial aspect" and "some edema in the inferior medical aspect of the lunate" suggestive of an acute injury. Employer's physicians argue that the TFCC tear and scapholunate injury pre-existed the accident and was degenerative in nature. However, there is no evidence in the record that

indicates Claimant had suffered previously from an injury to his left wrist/hand prior to the subject work accident, or that he had ever complained of pain in his left wrist. Further, Claimant testified that he had never injured his left hand, and as able to engage in heavy labor work as a longshoreman prior to the work accident with no pain in his left wrist/hand. However, following his accident, Claimant seems to have consistently complained of left wrist pain. Thus, more weight should be given to Claimant's treating hand surgeon, Dr. Dennis, who opines that Claimant's ligament injuries in Claimant's left hand/wrist resulted from, or were aggravated by, Claimant's March 25, 2004 work injury.

Notably, Dr. Cummings testified that a distal radius fracture is the most common fracture of the upper extremity and that they usually occur due to a fall on an out-stretched hand, as was suffered by Claimant during his work related accident. In addition, Drs. Cummings, Dennis and Eastlick all agree that another injury associated with distal radius fractures is ligament damage, with the soft tissues found in the region being at the most risk for damage. Further, Dr. Cummings and Dr. Eastlick agree that the tears of the TFCC and the scapholunate ligament are commonly associated with distal radial fractures, the exact fracture suffered by Claimant.

Also notably, even though Dr. Cummings refused to link Claimant's lingering pain to his work related accident, he noted that the tear in Claimant's ligament in his left wrist could have been affected by Claimant's work as a longshoreman:

> [Claimant] is a longshoreman, so he does a lot of heavy lifting, and I am sure that tear that we are seeing radiographically was degenerative as a result of his positive ulna variance and his [. . .] activities [. . .] with the use of that hand.

(EX 6-9). This opinion thus fails sufficiently to sever Claimant's employment as a cause of the tear in his wrist.

Despite the acknowledgement of the injury, Dr. Cummings failed to recommend surgical intervention to repair the tear in Claimant's left wrist. Rather, Dr. Cummings suggested that Claimant continue with aggressive physical therapy. However, Dr. Cummings opinion is entitled to less weight, as he last saw Claimant on May 28, 2004. The record indicates that Claimant had subsequently continued with therapy since this date, as suggested by Dr. Cummings, but has continued to have pain. (EX 6-12, 13). Thus, this evidence supports the reasonableness and necessity of Dr. Dennis' surgical recommendation.

Dr. Eastlick also acknowledges the tear, which he described as a "pre-existing degenerative perforation of his triangular fibrocartilage which was unrelated to the accident." (EX 1-55). Dr. Eastlick opined that this was not "an unusual finding in a gentleman of Claimant's age and work experience." (EX 1-55). However, Dr. Eastlick only examined Claimant once, and offers neither an opinion as to what treatment would be appropriate to repair the tear nor suggests how Claimant can ease his complaints of pain. Rather, Dr. Eastlick merely rules out the need for surgery with little explanation. Therefore, I find that Dr. Eastlick's opinion is entitled to less weight.

Dr. Dennis noted that Claimant has been under constant care for his wrist pain to no avail. Despite Claimant's therapy and treatment, Dr. Dennis noted that Claimant was at "eight months post injury without any significant improvement," as of December of 2004. (CX 5). Dr. Dennis noted that "[t]he goal of the indicated surgery is to ameliorate [Claimant's] pain to an acceptable level." (CX 5). Therefore, Dr. Dennis' surgical recommendation seems reasonable in light of Claimant's continued pain.

Based on the evidence in the record as a whole, I find that Claimant's tear is related to his work place injury. Additionally, per the opinion of Dr. Dennis, I find that surgery is a necessary and reasonable treatment of this injury. Therefore, based on the record as a whole, I find that Claimant is entitled under the Act to the medical treatment recommended by Dr. Dennis.

Nature and Extent of Disability

By accepting the stipulation of the parties[8], and having found that Claimant suffered a compensable injury, the nature and extent of Claimant's disability must be determined. The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its permanent or temporary nature and its total or partial extent. The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss or a partial loss of wage earning capacity.

As to the nature of the benefits sought in the present case, Claimant seeks temporary disability benefits from the date of the accident, March 25, 2004, through the present and continuing. Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curium), *cert. denied*, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

The Benefits Review Board has held that a determination that a claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of

[8] See supra. page 19.

permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978).

Claimant argues that he has not yet reached MMI since the surgery recommended by Dr. Dennis is expected to improve Claimant's condition. However, Dr. Eastlick opined that Claimant reached Maximum Medical Improvement by January 24, 2005. (EX 1-19). Notably, it is well-settled that the opinions of a treating physician are entitled to greater weight than the opinions of non-treating physicians in administrative proceedings. *See, e.g., Loza v. Apfel*, 219 F.3d 378, 395 (5th Cir. 2000). As Dr. Dennis is Claimant's treating physican of choice, and his opinion seems to indicate improvement with surgery, I find that Claimant has yet to reach MMI . Accordingly, all periods of disability since March 25, 2004, through the present and continuing are considered temporary under the Act.

As to the extent of the benefits sought in the present case, Claimant seeks total disability benefits commencing March 25, 2004, through the present and continuing. To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging*, 731 F.2d at 200; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978). Once claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Trans-State Dredging*, 731 F.2d at 200; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Employer argues that Claimant can return to work, as evidence by the opinion of Dr. Eastlick. Dr. Eastlick testified that Claimant should be able to perform all the normal duties that one would do in the course of being a longshoreman and all things he had done prior to his injury. (EX 1-22). Dr. Eastlick imposed no limitations on Claimant's activities. (EX 1-23). Therefore, Employer appears to argue that Claimant has failed to establish a *prima facie* case of total disability.

However, in the present case, Claimant testified that he has been unable to return to work since his accident because of the pain in his hand and back. (TR. at 44). Claimant also testified that he would not be able to operate a forklift with his injured wrist because of pain. (TR. at 44). Dr. Dennis testified that Claimant's complaints of pain were objectively identifiable. (CX 11-22). Additionally, Dr. Dennis opined that Claimant will not be able to go back to his former work as a longshoreman, because he will unlikely be able to regain the necessary strength in his wrist. (CX 5). When considered together, this evidence is more persuasive than the conclusory opinions of Dr. Eastlick. Therefore, I find that Claimant has established a *prima facie* case of total disability.

The burden thus shifts to Employer to show suitable alternate employment. *Trans-State Dredging*, 731 F.2d at 200; *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). However, in the instant matter, Employer has produced no evidence on the issue of suitable

alternate employment. Therefore, Claimant is considered to be and I find that he was totally disabled from March 25, 2004, through the present and continuing.

Compensation Rate

Claimant had previously been paid temporary total disability benefits from the date of the accident until March 9, 2005, at a rate of $257.71 per week. During the hearing, Claimant's counsel indicated at the hearing that he did not agree with the Employer's determination of Claimant's average weekly wage amounting to $325.44, with a resulting compensation rate of $257.71. Rather, Claimant's counsel indicated that he felt Claimant's average weekly wage was more "in the range of" $400.00 per week. (TR 5-6).

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *SGS Control Services v. Director, OWCP*, *supra*, at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26(CRT) (5th Cir. 1991).

On the basis of the totality of the record, I find that Section 10(a) cannot be used because Claimant had worked regularly for Employer only five months prior to his accident and there is nothing in the record indicating any other wages earned in the year preceding his injury. There is no evidence in the record Claimant worked substantially all of the year prior to his injury or that his work was regular and continuous. Notably, Claimant testified that he began working fulltime with the Longshore Union in October of 2003. (TR. at 45). Prior to being hired full-time, he worked "sporadically" as a Longshoreman. (TR. at 45). Because his employment in the year leading up to his injury was irregular and sporadic, the application of Sections 10(a) is precluded from this analysis.

Furthermore, Section 10(b) applies when the record contains the wage history of another employee who works, for substantially the whole of the year preceding Claimant's injury, at the same employment in which Claimant was injured, or some employment similar to it. *Robert N. Ward v. General Dynamics Corporation*, 9 BRBS 569 , 571 (1978). However, there is no evidence of this nature included in the record of the present case. Therefore, Section 10(b) is also inapplicable.

If neither of the previously discussed sections can be applied "reasonably and fairly," then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Sproull v. Stevedoring Services of America,* 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc*., 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel &Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. The Board will affirm a determination of average weekly wage under Section 10(c) if the amount represents a reasonable estimate of Claimant's earning capacity at the time of the injury. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

As stated above, Employer determined Claimant's average weekly wage at the time of his injury to be $325.44. Employer appears to argue that the amount actually earned by Claimant in 2003, the year precending his accident, is absolutely determinative. Though not clearly articulated, Employer appears to have reached this figure by taking Claimant's adjusted gross wages for 2003 as listed on his 2003 Income Tax Return (CX 7), and dividing by 52 weeks. ($16,923/52 = $325.44). On the other hand, Claimant merely stated at the hearing that he felt that his average weekly wage was more in the range of $400.

I find that neither Claimant's nor Employer's approach fairly apportions Claimant's average weekly wage based on the record and the jurisprudence. Claimant's approach is flawed because he merely alleges that his average weekly wage was more "in the range of $400," without supporting evidence or argument. This is simply insufficient under the Act. Employer's calculations are flawed because they do not take into account Claimant's increased hours and wages as reflected by Claimant's wage records from December of 2003 through March of 2004.

Notably, Claimant's wages in the weeks leading up to his injury, when Claimant was regularly employed as a Longshoreman, exceed both Claimant and Employer's estimations.[9] The thirteen weeks of wage records provided reflect Claimant's total earnings of $8,383.50. This averages out to a weekly rate of $644.89. Unfortunately, the remaining wage records are absent from the record, as is any evidence of the wages of comparable employees or of other wages Claimant may have earned in his additional occupations.

Considering the incomplete record, I find that the most accurate way to calculate Claimant's entitlement is to apply the minimum compensation rate of the Act. In making this determination, I find that Claimant has failed to meet the burden of proving his entitlement to a higher compensation rate under Section 10 of the Act. It additionally seems unjust to award Claimant a higher compensation rate given the seemingly unstable nature of Claimant's work history as evidenced by his 2003 IRS statement, which shows Claimant's total wages for 2003 were $16, 923. (CX 7). Claimant also testified that he has held a wide variety of jobs in his life,

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[9] The record does provide Claimant's pay stubs from December 2003 through March 2004. Though Claimant allegedly began working as a regular Longshoreman in October of 2003, the only wage records made available are those from December of 2003 through March of 2004. The following is a chart that represents the gross wages Claimant appears to have earned from the various Employers on each respective date.

Eller & Company, Inc.

12/10/03 $779.25
12/22/03$938.00
12/29/03$505.00
01/07/04$1342.00
01/14/04$454.50
01/21/04$837.01
01/28/04$724.25
02/04/04$725.13
02/11/04$227.25
02/25/04$505.00
03/03/04$227.25

13 weeks$7,264.64

South Stevedoring, Inc.

12/12/2003 $216.00
01/02/2004 $428.88

$634.98

Hallmark Stevedoring Company

12/26/2003 $222.38
01/16/2004 $ 41.50

$263.88

Universal Maritime Service Corp

02/06/2004$220.00

(CX 7)

though there is no evidence of how long he remained in each position. (TR. at 48). It thus seems unjust to suppose that Claimant would have remained steadily employed at his higher wage rate had he not been injured. Therefore, in light of the evidence in the record, albeit incomplete, I find that the most equitable resolution is to award Claimant the minimum compensation rate that was in effect at the time of Claimant's injury. Therefore, I find that Claimant is entitled to $257.70[10] from March 25, 2004 through the present and continuing.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Eller & Company, is hereby ordered to pay to Claimant, Johnnie Davis, compensation for temporary total disability from March 25, 2004, through the present and continuing at the compensation rate of $257.70;

2. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries, including the wrist surgery recommended by Dr. Dennis;

3. Employer shall receive credit for any compensation already paid;

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be served upon opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge

[10] Employer indicates that it has paid Claimant voluntary compensation in the amount of $257.71 from March 25, 2004 through March 9, 2005. I note that Employer is entitled to a credit for the $.01 overpayment for each weekly compensation made to Claimant during this period.